POLICE DEPARTMENT

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| In the Matter of the Disciplinary Proceedings | : | |
| - against - | : | FINAL |
| Police Officer Daniel Pantaleo | : | ORDER |
| Tax Registry No. 942805 | : | OF |
| Patrol Borough Staten Island | : | DISMISSAL |

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Police Officer Daniel Pantaleo, Tax Registry No. 942805, Shield No. 13293, Social Security No. ending in [redacted] having been served with written notice, has been tried on written Charges and Specifications numbered 2018-19274, as set forth on form P.D. 468-121, dated July 18, 2018, and after a review of the entire record, Respondent is found Guilty of Specification No. 1 and Not Guilty of Specification No. 2.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Daniel Pantaleo from the Police Service of the City of New York.

JAMES P. O'NEILL
POLICE COMMISSIONER

EFFECTIVE: 8/19/19

POLICE DEPARTMENT

August 15, 2019

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| In the Matter of the Charges and Specifications | : | Case No. |
| - against - | : | 2018-19274 |
| Police Officer Daniel Pantaleo | : | |
| Tax Registry No. 942805 | : | |
| Patrol Borough Staten Island | : | |

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Rosemarie Maldonado
Deputy Commissioner Trials

APPEARANCES:

For the CCRB: Suzanne O'Hare & Jonathan Fogel, Esqs.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: Stuart London & John Tynan, Esqs.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

## CHARGES AND SPECIFICATIONS

1. Police Officer Daniel Pantaleo, on or about July 17, 2014, at approximately 1530, while assigned to 120 PCT and on duty, in the vicinity of 202 Bay Street, Richmond County, recklessly used force, in that he used a chokehold against Eric Garner, causing physical injury.

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| P.G. 203-11 | USE OF FORCE<br>*(now encompassed by P.G. 221-01 and 221-02)* |
| Penal Law § 120.00 (2) | ASSAULT IN THE THIRD DEGREE |

2. Police Officer Daniel Pantaleo, on or about July 17, 2014, at approximately 1530, while assigned to 120 PCT and on duty, in the vicinity of 202 Bay Street, Richmond County, intentionally used force, in that he intentionally restricted Eric Garner's breathing by applying pressure to his throat and/or neck without police necessity, causing serious physical injury.

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| P.G. 203-11 | USE OF FORCE<br>*(now encompassed by P.G. 221-01 and 221-02)* |
| Penal Law § 121.13 | STRANGULATION IN THE FIRST DEGREE |

## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on May 13, 14, 15, 16, 21, and June 5 and 6, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB called Ramsey Orta, Michael Lewis, Sergeant Luke Gasquez, Deputy Inspector Charles Barton, Inspector Richard Dee and Dr. Floriana Persechino as witnesses in its case-in-chief. CCRB also called Dr. Jason Graham as a rebuttal witness. Respondent called Lieutenant Christopher Bannon, Sergeant Dhanan Saminath, Police Officers Mark Ramos, Craig Furlani, Justin Damico and William Meems, Russell Jung and Dr. Michael Graham as witnesses. Respondent elected not to testify on his own behalf and was not called as a witness by CCRB. Over CCRB's objection, a transcript of his December 8, 2014 Department interview was admitted into evidence.

A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having carefully reviewed the record in its entirety, I find Respondent Guilty of Specification 1 (recklessly causing physical injury) and Not Guilty of Specification 2 (strangulation with intent to impede breathing), and recommend that he be dismissed from the Department.

## 1. Factual Overview

This case involves the sequence of events leading up to the July 17, 2014 arrest and subsequent death of Eric Garner. Although critical issues of fact were contested during trial, many material facts were undisputed. Unless otherwise noted, what follows is a summary of the relevant, uncontested evidence presented to this tribunal during the hearing.

### *a. Background*

In March 2014, Lieutenant Christopher Bannon, the Special Operations Lieutenant for the 120 Precinct in Staten Island, attended a meeting at One Police Plaza focusing on quality-of-life conditions. During that meeting, Lieutenant Bannon was specifically tasked with addressing the illegal sale of untaxed cigarettes in the vicinity of 200 Bay Street, Staten Island, near Tompkinsville Park. From March 28 to July 16, 2014, multiple untaxed cigarette sale arrests were made at or near the targeted area. Eric Garner was arrested twice during this timeframe for circumventing the state tax law -- on March 28 (while in possession of 24 cigarette packs without NYS tax stamps) and on May 7 (while in possession of 6 cigarette packs without NYS tax stamps). (Tr. 408-13; Res. Exs. C-D)

At approximately 1400 hours on July 17, 2014, Lieutenant Bannon was driving by the intersection of Bay Street and Victory Boulevard when he observed a group of approximately 10 individuals "huddled" around Tompkinsville Park. Although he did not observe any sales or

exchanges, Lieutenant Bannon believed this gathering suggested that an illegal "transaction" might be taking place. He immediately called Sergeant Dhanan Saminath at the 120 Precinct and directed that the Quality-of-Life Coordinator, Police Officer Justin Damico, be dispatched to determine whether untaxed cigarettes were being sold. Lieutenant Bannon told Sergeant Saminath that a second police officer should also be assigned to assist. Sergeant Saminath selected Respondent, an Anti-Crime officer who was free at that time, to accompany Damico. (Tr. 413-16, 419-21, 423, 441-42, 464-67)

***b. Surveillance***

Respondent and Damico proceeded to the location in an unmarked police vehicle and parked at Saint Marks Place just north of Victory Boulevard – approximately 200 to 300 feet away from the Bay Street address. They conducted surveillance from their vehicle and observed a black male, and at least one other male, congregating in the vicinity of the beauty supply shop located at 202 Bay Street. (Tr. 597-98, 644-45; Resp. Ex. G at 16-19) Damico advised Respondent that he had observed a sale. (Tr. 598, 602, 607, 641; Res. Ex. G at 20-21)

The officers did not approach the target immediately. Instead, they drove around the block, eventually returning to Bay Street where they double parked their vehicle. During this repositioning, the officers were unable to observe 202 Bay Street.

Respondent claims that as they approached Mr. Garner, Damico disclosed that he witnessed a second sale. Respondent averred that he saw neither transaction. At trial, Damico made no mention of a second sale. (Tr. 602-03, Res Ex. G at 20, 23-28, 32)

***c. Parties Dispute Untaxed Cigarette Sale***

CCRB disputes that Mr. Garner was selling untaxed cigarettes that afternoon and presented witnesses who testified that he stopped a fight immediately prior to the officers'

arrival. Both Damico and Respondent denied having observed a fight during their surveillance. (Tr. 33-34, 165, 607; Res. Ex. G at 24, 57)

CCRB witness Ramsey Orta[1] testified at trial that he "kn[ew] for a fact" that Mr. Garner was not selling untaxed cigarettes that afternoon. He explained that after finishing a landscaping job at approximately 1530 hours, he ran into Mr. Garner at the KFC located near Tompkinsville Park. He described Mr. Garner as a neighborhood friend he had known for five years and admitted that he had previously bought untaxed cigarettes from him. Mr. Orta and Mr. Garner left the KFC together and proceeded to "the stoop" next to the beauty supply store at 202 Bay Street to talk football and make plans to go to Buffalo Wild Wings. (Tr. 30-33, 67, 84)

Mr. Orta testified that while he was with Mr. Garner, an acquaintance named Twin asked for a cigarette. Mr. Orta claims that he gave Twin a dollar "to take to the store" to make the purchase. According to Mr. Orta, after giving Twin the dollar, an unknown man struck Twin in the face causing a scuffle. Mr. Garner immediately "jumped up" and separated the two men, telling them to "take it up the block." It was at that point that an unmarked police car, which Mr. Orta had previously seen parked at the corner, approached. Twin and the other individual dispersed. (Tr. 33-35, 79-81)

A second CCRB witness, Michael Lewis, testified that he knew Mr. Garner in passing. According to Mr. Lewis, after work that day he ordered food at a Spanish restaurant in the vicinity of Bay Street and Victory Boulevard. He then proceeded to the Bay Street beauty supply store. As he walked to the store, he saw Mr. Garner "break up a fight." When Mr. Lewis

[1] At the time of the trial, Mr. Orta was incarcerated at Groveland Correctional Facility serving a four-year sentence after pleading guilty to criminal possession of a weapon and criminal sale of a controlled substance. Though he claimed that he did not commit those offenses, Mr. Orta did confirm other prior guilty pleas. (Tr. 30-31, 58-66)

exited the store approximately three minutes later. the fight participants had dispersed and two police officers were speaking to Mr. Garner. (Tr. 164-66, 170-72)

*d. Mr. Garner's Arrest*

Both Respondent and Damico had previous law enforcement interactions with Mr. Garner. Damico had approached Mr. Garner two weeks earlier after having observed him conduct an illegal cigarette sale. According to Damico, they had a ten minute discussion concerning his unlawful conduct during which Mr. Garner allegedly became "irate." Ultimately, Damico let him go with a warning. Three years prior, Respondent assisted his partner in the arrest of Mr. Garner for the sale of untaxed cigarettes. Respondent had no physical contact with Mr. Garner at that time and did not recall any conversation with him. He did, however, state that Mr. Garner subsequently accused Respondent's partner of stealing money that was on his person at the time of the arrest. (Tr. 599-601, Res. Ex. G at 29-31)

Upon exiting their vehicle, Respondent and Damico approached and positioned themselves on either side of Mr. Garner. Damico took the lead and advised Mr. Garner that he was under arrest for selling untaxed cigarettes. CCRB conceded that under the fellow officer rule, Respondent lawfully relied on the information Damico provided to effectuate Mr. Garner's arrest. (Tr. 922)

From the start, Mr. Garner denied the accusation. Both Mr. Lewis and Mr. Orta told the officers that all Mr. Garner had done was stop a fight. Damico continued to address Mr. Garner who emphatically denied any wrongdoing and did not comply with the officer's request to produce identification. Damico persisted in his attempt to convince Mr. Garner to comply so that they could avoid a physical altercation, but Mr. Garner claimed harassment by the police and refused to be handcuffed. (Tr. 37-40, 166, 604-07, 612-15; Res. Ex. G at 33-34; CCRB Ex. 1)

Mr. Orta began recording the interaction on his cell phone about one to five minutes after the officers first approached.[2] (Tr. 37, 604, 649) What follows is a summary of the verbal dispute that ensued.

*File 1:*

0:01-0:30: Mr. Garner tells Damico, "What are you talking about? I didn't do anything, I didn't sell nothing, I didn't do shit." He briefly buries his face in his hands before stating, "Minding my business, a fight break out, I stopped it…Are you serious?"

0:33-0:46: An unseen female asks for Damico's name, which he says and spells out. Mr. Garner again insists that he was minding his own business. Damico tells Mr. Orta to "Take a ride down the block;" Mr. Orta says, "I live here."

0:48-1:15: Respondent is seen for the first time standing to the right of Mr. Garner with his arms folded across his chest. Damico continues to address Mr. Garner in a low tone. Mr. Garner insists, "I didn't do nothing." As Damico speaks to Mr. Orta, Respondent briefly talks to Mr. Garner. The substance of that exchange was not audible. Respondent then stands to the side with his arms crossed.

1:18-1:31: Mr. Garner can be heard saying that he does not have ID and questions, "Take me back for what?" He then raises his voice and asserts, "I didn't sell anything, I did nothing, we sitting here the whole time, minding our business."

1:35-2:05: Mr. Garner and Damico continue their exchange. Damico asserts that he saw Mr. Garner sell cigarettes. Mr. Garner asks, "Who'd I sell a cigarette to? To who?" Damico can be heard referencing a red shirt. Mr. Orta calls out, "That's who had the fight, yo boss, that's who had the fight." Damico tells Mr. Orta to move back. As Damico speaks to Mr. Orta, Mr. Garner turns to Respondent, gestures with outstretched hands and continues to protest. Respondent's arms remain crossed.

*File 2:*

0:01-0:07: Mr. Garner shouts, "For what? Every time you see me you want to mess with me. I'm tired of it; this stops today."

0:08-0:58: Gesturing broadly with his hands, Mr. Garner says "No" multiple times and insists that he did nothing. He states, "Every time you see me, you wanna harass me, you wanna stop me…. I'm minding my business officer. I'm minding my business. Please leave me alone, I told you the last time, please just leave me alone." Damico says something inaudible as Mr. Garner continues to insist that he did not sell cigarettes. The officers remain calm.

[2] Mr. Orta provided his cell phone recording to the Daily News, ultimately entering into a contract from which he still receives licensing royalties. He estimated that as of the hearing date, he had earned approximately $20,000 from that agreement. (Tr. 47, 54-56)

0:59-1:17: Mr. Garner's agitation escalates as he gestures with his hands and yells. "I don't got no bag." He adds, "Because right now I'm pissed the fuck off." Damico replies, "I'm pissed off that you're yelling." Respondent asks whether Mr. Garner is going to resist. Mr. Garner puts his head in his hands, insisting that he was just "minding his own business." As Damico moves closer, Mr. Garner becomes louder, repeatedly crosses and uncrosses his arms as he loudly says, "No" three times. Damico steps back and reaches for the pepper spray in his back pocket.

1:18-2:07: Damico looks in Respondent's direction and nods his head. Respondent then takes out his radio and speaks into it. As he is doing so, Mr. Garner repeats, "I did nothing," several times. Turning specifically toward Damico, he incredulously asks, "People out here fighting and you grabbing me for what?" He demands to know, "To who?" he was selling cigarettes, repeating this several times. Respondent speaks into his radio a second time. Damico warns Mr. Garner that they can do this the "easy way" or the "hard way."

Respondent's counsel characterized Mr. Garner's agitation as resisting arrest. CCRB argued that Mr. Garner was simply trying to talk his way out of the arrest, as he had successfully done only weeks before when Damico first stopped him. (Tr. 887, 896, 923, 967-68) Whatever Mr. Garner's objective, it is clear that for at least four minutes into the recorded portion of the encounter, and at least one minute prior to that, he refused to cooperate with the arrest and comply with lawful orders.

When Respondent reached for Mr. Garner's right hand, Damico moved in to grab his left hand. Mr. Garner pulled away saying, "Don't touch me, please. Don't touch me." As Police Officers Craig Furlani and Mark Ramos approached, Respondent put his right arm under Mr. Garner's right armpit and his left arm went over Mr. Garner's left shoulder and a physical altercation ensued. Respondent was 6' 1" tall and weighed 210 pounds; Mr. Garner was 6' 2" tall and weighed 395 pounds. (Res. Ex. G at 38-40; CCRB Exs. 1 & 9)

The specific maneuvers used, and how they were executed by Respondent, form the crux of this disciplinary case and will be discussed in detail in Sections 3 and 4.

*e. Aftermath*

As Mr. Garner was brought to the ground, Sergeant Kizzy Adonis and Police Officer William Meems arrived at the scene. According to Respondent, he heard Mr. Garner "wheezing." Mr. Garner repeatedly said "I can't breathe" as he lay on the sidewalk. Mr. Garner's words became more labored until he fell silent. None of the officers at the scene had contact with Mr. Garner's neck as he uttered those words. (Res. Ex. G. at 58-59)

At trial it was noted that, due to Mr. Garner's size, the officers had to join three handcuffs to secure him. They then followed procedures by moving him from a prone position onto his side. Officers at the scene testified at trial that they believed Mr. Garner could have been feigning unconsciousness as part of a ruse to avoid arrest. During questioning Damico agreed that Mr. Garner might have been "playing possum." As Mr. Garner continued to lay unresponsive on the ground, Officer Meems observed that his breathing was shallow, confirmed there was a pulse and called for someone to notify EMS. (Tr. 454, 577-79, 587, 629-30, 655-56; Res. Ex. G at 62)

Sergeant Saminath arrived on the scene in response to Respondent's radio call. From six feet away, he heard Mr. Garner's breathing and noted that he was having "difficulty." He made a second call to EMS to ensure they were en route. While they waited, he asked Respondent, "What is going on, how did this happen?" Respondent explained that Mr. Garner had not been compliant and demonstrated the maneuver he had purportedly executed. That demonstration was captured on a cellphone video recorded by Michael Lewis. (Tr. 167-69, 446-49, 470-74; Res. Ex. G at 47-48, 65; CCRB Ex. 3)

Sergeant Saminath directed Damico to search Mr. Garner's person. Damico recovered four sealed packs of cigarettes and a fifth open pack containing 15 cigarettes from the left pocket

of Mr. Garner's shorts. Each cigarette pack had a Virginia tax stamp and not the required New York State tax stamp. (Tr. 452-53, 631-33; Res. Ex. E)

Approximately five minutes after Mr. Garner was taken to the ground, EMS arrived on the scene. Thereafter, multiple officers assisted in moving him onto the ambulance. (T. 450, 453, 579, 633-34; Res. Ex. G at 67-69) Sergeant Saminath directed Damico to accompany Mr. Garner. Respondent, and eventually Sergeant Saminath, followed. After driving a very short distance, the ambulance pulled over and waited for a paramedic to arrive and assist on board. The paramedic used a defibrillator and began CPR. Upon arrival at Richmond University Medical Center, emergency room personnel took over the CPR efforts. Mr. Garner was intubated with a breathing tube inserted into the airway through the mouth. A nasogastric tube was also inserted into the stomach via the right nostril and the esophagus. (Tr. 279, 301, 453-58, 635-41; Res Ex. G at 70-71)

Sergeant Saminath remained at the hospital for five minutes. He returned to the precinct and advised his Commanding Officer that it "doesn't look good." The Commanding Officer directed him to notify the Internal Affairs Bureau (IAB), which he did immediately. He also texted Lieutenant Bannon, to inform him that Mr. Garner had "resisted" and "might be DOA." Lieutenant Bannon responded, "For the smokes?" Sergeant Saminath confirmed, "Yea" and explained that Respondent "grabbed him [and] they both fell down." Lieutenant Bannon answered, "Ok. keep me posted, I'm still here...Not a big deal, we were effecting a lawf[ul] arrest." At trial, Lieutenant Bannon explained that his intent was not to minimize the significance of a civilian's death, but to put the officers' "mind[s] at ease" after a "bad situation." (Tr. 416-17, 427-29, 458-60; CCRB Ex. 17) Shortly thereafter, Respondent advised Sergeant

Saminath that Mr. Garner had been pronounced dead. Sergeant Saminath made additional notifications. (Tr. 461)

Upon returning to the 120 Precinct, Damico processed the arrest paperwork and drew up the charges. The online arrest report has a field labeled "Force Used," in which Damico entered "No." He also cited the felony section of NY Tax Law §1814(A), as the "top" charge against Mr. Garner; this section requires evading taxes on 10,000 or more cigarettes, amongst other violations. The complaint report filled out by Damico did not cite a felony violation, but instead listed the "most serious offense" as a tax law misdemeanor. At trial, Damico confirmed that Respondent did not possess the quantity of tobacco necessary for a felony charge. (Tr. 656-63; CCRB Ex. 18)

*f.* ***Autopsy***

Mr. Garner's autopsy was performed on July 18, 2014, by Dr. Floriana Persechino of the Office of the Chief Medical Examiner of the City of New York. Her findings were summarized in the Report of Autopsy dated August 6, 2014. (CCRB Exs. 9 & 16) Certain diagnoses and conclusions in the report were disputed by the parties and will be discussed in greater detail in Section 3(c). The following medical findings were uncontested:

- The cause of death was not asphyxiation from a chokehold. (Tr. 321, 358, 817, 860)
- The decedent's anterior neck muscles displayed fresh hemorrhaging across multiple muscle groups that was the result of pressure applied to the anterior neck. Specifically, a layer-by-layer dissection of the neck musculature revealed hemorrhaging in: the left and right sternocleidomastoid; the left and right sternohyoid; the left and right omohyoid; and the right thyrohyoid. Hemorrhaging was also observed around the left submandibular gland. (Tr. 289-301, 779, 799-804; CCRB Ex. 10I-10T)
- There were petechial hemorrhages in the conjunctiva of the eyes and on the face, most notably the upper lip. Petechiae result from the rupture of very small blood vessels. In this instance, the petechiae could have been caused by neck compression, prone positioning and/or cardiopulmonary resuscitative efforts. (Tr. 283-86, 773, 791-92; CCRB Ex. 10D, 10W-Y)

- There were areas of hemorrhage in the base, root and body of the tongue, which were observed upon removal of the neck block. There were also fascial hemorrhages noted in the area of the hypopharynx. These hemorrhages may have been caused by intubation. (Tr. 302-04, 355; CCRB Ex. 10U)

- There were no external injuries around the decedent's neck. The experts agree that the absence of such injuries are "not uncommon" in cases where a forearm compresses the neck. (Tr. 287-88, 337, 773, 811; CCRB Ex. 10E-F, 10H)

- There were no fractures nor indications of trauma to the trachea or the larynx. At trial, it was explained that such injuries are not typically observed in most neck compression cases. (Tr. 303-05, 334-39, 352, 371-72, 779, 809-11)

- The decedent had significant health problems that put him at risk and contributed to his death, including:

    - An enlarged heart that weighed 660 grams, which the medical experts concurred was indicative of hypertension. (Tr. 291-92, 325, 776, 861, 886)

    - Chronic asthma. The autopsy revealed that his lungs had experienced physiological changes that were consistent with asthma; that he had required a prior intubation; and that anti-asthma medication was present in his bloodstream at the time of death. (Tr. 313, 355-56, 789, 865-66)

    - Obesity. He weighed 395 pounds and had a body mass index (BMI) of 50.7. A BMI of 30 or above is considered obese. (Tr. 292, 323, 773, 861)

## 2. Procedural History

### *a. Internal Affairs Bureau Investigation and Service of Charges*

An investigation was commenced by IAB the day after Mr. Garner's death; Sergeant Luke Gasquez was the assigned investigator and Deputy Inspector Charles Barton was the group's Commanding Officer. Approximately 16 civilian witnesses and 21 uniformed witnesses were interviewed, including Respondent. (Tr. 99-100, 122-24, 131; Res. Ex. G) In a memo dated January 15, 2015, Deputy Inspector Barton requested that Charges and Specifications be preferred against Respondent "for violation of Patrol Guide 203-11, 'Use of Force,' in that he placed Eric Garner in a chokehold." (Tr. 125-29, 133; CCRB Ex. 5)

Neither the Department Advocate's Office nor CCRB served Respondent with Charges and Specifications prior to the expiration of the 18-month statute of limitations. (N.Y. Civ. Serv. Law 75(4)) In fact, although the underlying incident at issue here occurred on July 17, 2014, CCRB did not serve Respondent with the required Charges and Specifications until July 20, 2018 – four years after the incident and approximately two and a half years after the expiration of the statutory timeframe.

***b. Pre-Hearing Motion to Dismiss: Jurisdiction***

On March 20, 2019, Respondent filed a motion to dismiss on the grounds that CCRB lacked jurisdiction to prosecute this case. Specifically, Respondent's counsel argued that CCRB could not bring disciplinary charges against Respondent because the July 18, 2014 telephone complaint that triggered the initial investigation was not made by an eyewitness to the incident as required by its Rules. In a memorandum decision dated April 8, 2019, this tribunal denied Respondent's motion, finding that the information relayed during the intake call provided CCRB with a rational basis to move forward with an investigation and, ultimately, a prosecution.

On April 30, 2019, pursuant to N.Y. C.P.L.R Article 78, Respondent's counsel filed an *ex parte* application for an Order to Show Cause challenging CCRB's jurisdiction and requesting a preliminary injunction and a temporary restraining order enjoining CCRB from prosecuting this disciplinary case. After oral argument on April 30, the Hon. Joan Madden of the Supreme Court of the State of New York, New York County, declined to issue the requested temporary restraining order. In a May 8, 2019 Order (Index No. 100641/19), the request for a preliminary injunction was denied. The court found that Respondent did not demonstrate: (i) a "likelihood of success on the merits as he has not adequately shown that the CCRB lacks jurisdiction over this

proceeding . . . ;" (ii) that the equities balanced in his favor; or (iii) that he would suffer irreparable harm. As such, the hearing commenced as scheduled on May 13, 2019.

***c. Pre-Hearing Motion to Dismiss: Statute of Limitations***

On May 9, 2019, this tribunal issued a decision concerning Respondent's Motion to Dismiss the Charges and Specifications on the grounds that Respondent had been served after the statute of limitations had expired. Although neither the Department Advocate's Office nor CCRB served the charges in a timely manner, the motion was denied consistent with the crimes exception to Section 75(4) of the Civil Service Law. This tribunal ruled that because the statute of limitations was missed, any charges of misconduct based solely on Patrol Guide violations were time-barred. The text of that motion decision is set forth below:

> *The Civil Service Law carves out what is known as a crimes exception to the limitations period. Section 75(4) provides in pertinent part that the 18-month statute of limitations:*
>
> > *[S]hall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.*
>
> *The threshold determination as to whether the crimes exception provision applies requires that a court limit its review to the allegations of misconduct described in the charges and specifications "without consideration of the proof or papers submitted in petitioner's subsequent judicial proceeding (or at any ensuing disciplinary hearing) challenging the charges as untimely." Matter of Snowden v. Village of Monticello, 2018 N.Y. App. Div. LEXIS 8160 (3d Dep't 2018), citing, Matter of Rodriguez v. County of Albany, 105 A.D.3d 1124 (3d Dep't 2013).*
>
> *In this matter, Specification 1 cites to New York Penal Law 120.00(2) (Assault in the Third Degree); and, Specification 2 cites New York Penal Law 121.13 (Strangulation in the First Degree). Each specification then sets forth the elements of the respective crime cited therein. In addition, both specifications cite to Patrol Guide 203-11 (Use of Force).*
>
> *The tribunal's determination is that the Charges and Specifications served in this case conform to the requirements of the crimes exception clause set forth in Civil Service Law Section 75(4). Moreover, this tribunal sees no reason to strike the Patrol Guide citation in the charges because it is clear by the plain language of the*

*charging instrument, that the elements which must be proven are the elements of the cited crimes. There is precedent for this conclusion. For example in Disciplinary Case No. 72712/97 (October 16, 1998), the charging instrument included citations to both the Penal Law and the Patrol Guide. The findings of misconduct in that case were upheld in Mieles v. Safir, 272 A.D.2d 199 (1st Dep't 2000) (Charge specifying 'unauthorized exercise of (police officer's) official functions,' in violation of New York City Police Department Patrol Guide's prohibition against 'conduct prejudicial to good order, efficiency or discipline of the department,' was not barred by 18-month Statute of Limitations in N.Y. Civ. Serv. Law §75(4) since misconduct charged also constituted crime of official misconduct).*[3]

*In issuing this ruling I note that any finding of guilt in this case must be predicated on CCRB proving, by a preponderance of the credible evidence, each element specified in the charges which conform to the charged Penal Law crimes and bars them from prosecuting Respondent for Patrol Guide administrative violations that do not include the elements of those charged crimes. For example, only proving a violation of the chokehold provision of Patrol Guide Section 203-11 would not be sufficient to establish misconduct in this case. In short, the Section 75(4) crimes exception does not open the door to findings of misconduct based solely on administrative Patrol Guide violations unless all elements of the Penal Law crimes are also proven.*

*I also note that this is not an evidentiary ruling on the relevance of Patrol Guide 203-11 and Department Use of Force protocols. For example, Respondent's training and the Department's directives for enforcement actions may be appropriate evidence in this proceeding. As noted in the cases cited above, guilt of the statutory crimes charged may be proven by way of showing administrative violations.*

## 3. Assault in the Third Degree

Respondent is charged with "recklessly us[ing] force, in that he used a chokehold against Eric Garner, causing physical injury." The language of this specification mirrors §120.00(2) of the Penal Law which provides that "a person is guilty of assault in the third degree when ... he

[3] *See also Folborg v Bratton*, 227 A.D.2d 108 (N.Y. App. Div. 1st Dep't 1996), *lv to app. den.*, 88 N.Y.2d 812 (1996) (Disciplinary proceeding for fraud-related charges was not time-barred under N.Y. Civ. Serv. Law § 75(4) where Respondent was charged with violating Department Rules and Regulations by engaging in a scheme to defraud because facts alleged would, if proved in court, constitute larceny by false promise under N.Y. Penal Law §155.05(2)); *Aliberti v. O'Connor*, 231 A.D.2d 472 (1st Dep't 1996) (upholding ALJ determination that transit officer abused his authority as a police officer by falsely charging an individual with assault, and that petitioner made a false memo book entry and a false oral statement about the incident to an investigating sergeant and noting that "the administrative proceeding was timely under N.Y. Civ. Serv. Law § 75(4) since petitioner's misconduct would have constituted a crime had it been prosecuted in a criminal court").

recklessly causes physical injury to another person." Accordingly, at issue is whether CCRB proved each of the following by a preponderance of the credible evidence: [4]

i. Respondent used a chokehold;
ii. He acted recklessly in executing the chokehold; and,
iii. The chokehold used by Respondent caused physical injury.

For the reasons set forth below, I find that CCRB satisfied its burden of proof and that Respondent engaged in the misconduct charged in Specification 1.

***a. Respondent Used a Prohibited Chokehold***

As noted above, because Respondent was not served within the 18-month statute of limitations period, a finding of misconduct cannot turn solely on whether Respondent used a prohibited chokehold as defined in §203-11 of the 2014 Patrol Guide. Due to this procedural irregularity, in place of using the Departmental construct applied in most disciplinary hearings, CCRB has the added burden of proving all elements of the Penal Law crime. *Aronsky v. Bd. of Ed.*, 75 N.Y.2d 997 (1990) To that end, Specification 1 narrowly alleges that the force used by Respondent in violation of a Penal Law crime took the form of a chokehold. Within this context, the Patrol Guide provides a partial framework for determining whether CCRB met its burden of proof and sets a baseline by which Respondent's conduct can be preliminarily evaluated.

The Patrol Guide[5] affirms in plain language that, "Members of the New York City Police Department will NOT use chokeholds." It then states that a chokehold "shall include but is not limited to, any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air." It is, as noted by Inspector Richard Dee, the Commanding Officer of the

[4] For purposes of making an administrative disciplinary determination, it is immaterial whether the charges would be proven beyond a reasonable doubt in a criminal court. *Police Dep't v. Baksh*, OATH Index No. 1471/97 (Oct. 2, 1997), citing *Human Resources Administration v. Brasheman*, OATH Index No. 936/90 (Aug. 2, 1990)

[5] On July 17, 2014, Patrol Guide (P.G.) procedure 203-11 ("Use of Force") prohibited NYPD officers from using chokeholds. That procedure has since been incorporated into P.G. 221-01 and 221-02, the revised Use of Force sections. All discussion of and citations to the Patrol Guide contained in this report refer to the procedure in effect on the date of the incident. (Tr. 195-204; CCRB Ex. 4D)

Recruiting Training Section of the Police Academy, a "broad" definition. (Tr. 225-26) Furthermore, there is no *mens rea* requirement to prove a violation nor is there a requirement that the pressure exerted actually hinder breathing or cause any injury.

Upon careful review of the record in its entirety, this tribunal finds that there is overwhelming evidence that Respondent used a prohibited chokehold, as defined by the 2014 Patrol Guide. The most compelling evidence of this violation is the cell phone video that captured Respondent's forearm wrapped around Mr. Garner's neck, in conjunction with the uncontested autopsy findings that there was fresh hemorrhaging across multiple layers of Mr. Garner's neck muscles which was caused by the application of pressure to his neck. (CCRB Ex. 1; Tr. 289-300) Respondent's use of a prohibited chokehold can be discerned on CCRB Ex. 1, File 2 from 2:25-2:26 (CCRB Ex. 13J-M) and from 2:27-2:36 (CCRB Ex. 13O-V).

Set forth below is a detailed summary of this tribunal's findings concerning the video evidence and still photos which established that Respondent disregarded the Department's chokehold ban:

2:14-2:21: Respondent touches his handcuffs, stretches his right arm and gestures toward Mr. Garner. He grabs Mr. Garner's right wrist as Damico makes contact with the left. Sirens can be heard in the background and a police vehicle pulls up. Mr. Garner raises his hands above his elbows saying, "Don't touch me, don't touch me." Damico is holding his handcuffs as he again makes contact with Mr. Garner's left wrist but Mr. Garner pulls back, repeating, "Don't touch me please, do not touch me." Respondent stands behind Mr. Garner and tries to grab his right arm in an attempted arm bar hold. (CCRB Exs. 13A-B)

2:22: As he stands behind Mr. Garner, Respondent brings his right arm under Mr. Garner's right armpit and wraps it around his right shoulder. Respondent's left arm comes over Mr. Garner's left shoulder and his left hand presses against the upper chest. Respondent's left hand flexes upward and then extends downward as he pulls Mr. Garner back and to the right. (CCRB Exs. 13C-F)

2:23-2:24: Respondent and Mr. Garner twist and stumble in the direction of a glass storefront. Damico pulls Mr. Garner's shirt in an attempt to steer them away from

the glass. Police Officers Ramos and Furlani approach. Voices warn, "Window."(CCRB Exs. 13G-I)

2:25-2:26: Respondent's upper back makes contact with the glass. Respondent's left forearm presses against Mr. Garner's anterior neck as he pulls him back in what constitutes a chokehold. Mr. Garner's open right hand is raised as Respondent pulls him to the left toward the ground. From their respective positions, Police Officers Ramos, Furlani and Damico attempt to handcuff the subject. (CCRB Exs. 13J-N)

2:27-2:29: Respondent twists Mr. Garner to the left and toward the ground as they come off the window. As they fall, Respondent is positioned on Mr. Garner's back and his right arm is no longer under Mr. Garner's armpit. Mr. Garner lands sideways on his left hip and then balances himself on his hands and knees. Respondent's right hand clasps his left hand as his left forearm continues to press against Mr. Garner's anterior neck in a chokehold. Mr. Garner seems to grimace and falls forward, face down. (CCRB Exs. 13O-P)

2:30-2:31: Mr. Garner's open right hand extends forward. Damico pushes down on the back of Mr. Garner's head. Respondent is on Mr. Garner's back with his left forearm holding onto Mr. Garner's anterior neck in a chokehold. At least one of Respondent's feet is off the ground. Mr. Garner makes a guttural sound. Respondent keeps his hands clasped as his left forearm maintains the chokehold. (CCRB Ex. 13Q)

2:32-2:35: Mr. Garner, who is on the ground, is pulled onto his right side with his hand open and his palm extended upwards as officers attempt to cuff the left hand. Respondent is still behind him with his hands clasped and his left forearm pressed across Mr. Garner's anterior neck in a chokehold. As Respondent shifts his weight and begins to release his clasped hands, Mr. Garner coughs and grimaces. Respondent's left forearm remains positioned against Mr. Garner's throat in a chokehold. (CCRB Exs. 13R-T)

2:35-2:36: Respondent's right hand extends forward toward Mr. Garner's right hand. His left arm maintains the chokehold. (CCRB Exs. 13T-V)

2:37: Respondent removes his left forearm from Mr. Garner's throat. (CCRB Exs. 13W-X)

2:38-2:49: Respondent pivots forward and uses both hands to press the side of Mr. Garner's face into the ground. Mr. Garner audibly says, "I can't breathe." An officer states, "Put your hand behind your back." Mr. Garner repeats, "I can't breathe" until he falls silent. At this point no officer has contact with Mr. Garner's neck. (CCRB Exs. 13Y-Z, 13AA-CC)

CCRB witnesses, Ramsey Orta and Inspector Richard Dee, provided the following credible testimony that was instructive and supported the findings set forth above.

Mr. Orta[6] confirmed that during the first moments of the physical encounter, Respondent did not use a chokehold. Specifically, he testified that when Respondent first put one arm under "Eric's" armpit and the other around his shoulder, "Pantaleo's arm wasn't fully around his neck." It was only after "Eric lost his footing" that Mr. Orta saw Respondent's arm "around" his neck and Respondent "trying to interlock his fingers together." At trial, he underscored that Respondent's hands were "locked together" at CCRB Ex. 1, File 2 at 2:34. (Tr. 41-44, 51-52, 73, 86) His eyewitness observations were reliable and corroborate this tribunal's assessment of those sections of the video evidence.

Inspector Dee's straightforward and reliable testimony was also informative. He testified that, having viewed the video and still photos, he had concluded that Respondent's arm placement in CCRB Exs. 13P, 13R and 13T "meets the definition" of a prohibited chokehold. In support of this conclusion, he noted that when Mr. Garner fell to the ground, he both "cough[ed]" and "grimace[ed]." He added that when viewed within the context of the positioning of Respondent's arms and hands, Mr. Garner's reaction was indicative of having been placed in a chokehold just seconds before. (Tr. 218-221; CCRB Exs. 13R & 13T) Based on its own review, the tribunal concurs with Inspector Dee's rational assessment of this portion of the video.[7]

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[6] This tribunal acknowledges that Mr. Orta's trial testimony was, at times, equivocal. For example, on direct Mr. Orta testified that Respondent was "still trying to choke" Mr. Garner after he uttered that he could not breathe. When presented with the video again on cross-examination, Mr. Orta confirmed that Respondent's arm was not around Mr. Garner's neck when he uttered that phrase at CCRB Ex. 1, File 2 at 2:38-2:46. (Tr. 45, 87-91) Nevertheless, I found Mr. Orta's testimony, on the whole, to be candid, detailed and thus reliable on the points specified above.

[7] Dr. Persechino also pointed out that Respondent's maneuver fit the forensic definition of a chokehold: "the use of the forearm placed across the anterior neck pressing backward compressing the neck." (Tr. 277-278, 305-306; CCRB Ex. 11)

In contrast, this tribunal found Respondent's denial that he used a chokehold to be both implausible and self-serving. It should be noted that although present, Respondent did not testify at trial. Instead, the transcript of his December 8, 2014 IAB interview was admitted into evidence.[8]

This tribunal has held many times that while hearsay is admissible in administrative proceedings, and may be the sole basis for a finding of fact, it must be carefully evaluated before it is relied upon. The more central the hearsay is to the case, the more critically it should be assessed. A tribunal must review a number of factors to determine the reliability and probative value of hearsay, including witness availability, the independence or bias of the declarant and the degree to which the statement is corroborated. *See Police Dep't v. Ayala*, OATH Index No. 401/88 (Aug. 11, 1989), aff'd sub nom., *Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't 1991); *see also Police Department v. Lowe*, OATH Index No. 892/91 (June 3, 1991), citing *Transit Authority v. Maloney*, OATH Index No. 500/91 (Apr. 19, 1991), *aff'd sub nom. Maloney v. Suardy*, 202 A.D.2d 297 (1st Dep't 1994). Based on these evidentiary standards, Respondent's hearsay statement was found to have questionable reliability and limited probative weight. What follows is a more detailed assessment of his out-of-court statement.

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[8] The transcript of Respondent's IAB interview was admitted into evidence over the objection of CCRB. At the hearing, CCRB chose not to call Respondent as a witness, erroneously claiming that they would "only [be permitted to] use direct questions." Even after being advised that Respondent could be called as a hostile witness, and therefore subject to cross-examination, CCRB declined to do so. (Tr. 818-21) Surprisingly, CCRB's Post Hearing Memorandum repeated the same erroneous assertion. (CCRB Brief at pp.49-50) CCRB's continued use of an invalid legal argument seems to willfully disregard basic and longstanding evidentiary principles relating to the testimony of a hostile witness. *See Fox v Tedesco*, 15 A.D.3d 538 (2d Dep't 2005); *Jordan v. Parrinello*, 144 A.D.2d 540 (2d Dep't 1988) ("When an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions."), citing *Becker v. Koch*, 104 N.Y. 394 (1887) ("With regard to adverse witnesses, all the rules applicable to the examination of other witnesses do not in their strictness apply. . .[L]eading questions may be put to [an adverse witness] by the party calling him, for the very sensible and sufficient reason that he is adverse and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist."); *see also Gordon v. Brown*, 84 N.Y.2d 574 (1994) (recognizing "a limited right to cross-examine adverse witnesses in administrative proceedings" in the interest of due process); *Disciplinary Case No. 10592/13* (Aug. 1, 2014) (noting that leading questions were permitted as the "remedy available" to CCRB when calling a hostile witness). The tribunal's evidentiary ruling on the admission of Respondent's IAB interview can be found on pages 822-24 of the hearing transcript.

CCRB also contends that it would have been "futile" to call Respondent as a witness because his counsel indicated that he would not take the stand. This argument ignores the option CCRB could have invoked of having a ranking uniform member of service order Respondent to answer CCRB's questions and warn him that failure to do so could result in additional disciplinary consequences, including suspension and termination.

During his IAB interview, Respondent admitted to investigators that he was cognizant of the Patrol Guide's prohibition against chokeholds. When specifically asked about his understanding of this Department policy he replied, "That we are not to use them." (Res. Ex. G at 43) He was unsure, however, whether the Patrol Guide provided a definition for this banned tactic. When asked what he understood a chokehold to be, he erroneously replied that, "you take your two hands and you're choking their throat or if you use your forearm grasped with the other hand and you pull back with your forearm onto the windpipe preventing him from breathing." After providing what this tribunal finds to be a more restrictive definition, Respondent was asked to read the Patrol Guide chokehold section aloud. The investigators then inquired as to whether he had used a prohibited chokehold to bring Mr. Garner to the ground or secure him physically. Respondent answered, "No, I did not." (*Id.* at 43-44)

Upon questioning by his own attorney at that interview, Respondent focused on the moment when he was "coming off the window ... on Mr. Garner's back." Respondent provided the following explanation for the positioning of his left forearm against Mr. Garner's throat at this point during the physical encounter:

> I was able to push him forward to now where I landed with my feet up in the air behind me and only one arm around his upper area, I believe close to his throat, but his throat area was in the crook of my elbow.

Respondent's attorney then asked, "Were you pressuring his neck at that point?" Respondent replied:

> [T]here was no pressure to the neck, it was pretty much me just laying on him, preventing him from trying to get back up on all fours.

(*Id.* at 45-47)

IAB investigators then played a segment of the video capturing Respondent's arm around Mr. Garner's neck. Although he admitted that his one "arm" was "holding on" to his "other arm" during that segment, he again denied having used a chokehold. (*Id.* at 53)

I found Respondent's uncorroborated hearsay statements explaining his actions to be untruthful. First, I found Respondent to be disingenuous when he viewed the video and denied using a chokehold, even though his actions were completely consistent with his own erroneous and restrictive definition of the Patrol Guide prohibition. Second, the preponderance of the credible evidence contradicted his rationalization that the positioning of his elbow protected Mr. Garner's neck and that he exerted no pressure to the throat. Specifically, Respondent's self-serving version of events failed to satisfactorily account for the uncontroverted medical evidence of hemorrhaging in Mr. Garner's anterior neck muscles and this tribunal's own assessment of the video evidence capturing Respondent clasping his hands and pressing his forearm against Mr. Garner's neck.[9]

The accounts presented by Respondent's witnesses on this point were also unhelpful or unreliable. In fact, the more central the factual inquiry was, the more vague recollections became. Police Officers Ramos and Furlani responded to the scene but testified at trial that they did not note the positioning of Respondent's arms during the encounter. (Tr. 500-02, 530, 535-36) Officer Meems testified that by the time he arrived, Mr. Garner was already on the ground and he did not "focus on any one spot." (Tr. 574, 583) Even Damico, who can be seen at various points stretching his own hand between Mr. Garner's head and Respondent's face, claimed that he had "no focus" on what Respondent was doing. (Tr. 624-25; CCRB Exs. 13M-13Q)

[9] With the exception of Officer Meems, who merely took Mr. Garner's pulse, the evidence confirmed that no other officer had contact with Mr. Garner's neck. (Tr. 46; CCRB Ex. 1)

Respondent's Police Academy instructor, retired Sergeant Russell Jung, also provided unpersuasive testimony on critical factual issues. He reviewed the video at trial and presented the conclusory opinion that a chokehold was not used because he did not "see an airway restriction" and did not "know where the pressure [was] being applied." Equally unconvincing was his echoing of Respondent's debunked theory that the positioning of his elbow "protected" Mr. Garner's windpipe. (Tr. 718; CCRB Ex. 1 at 2:34; CCRB Ex. 13S)

In sum, having carefully considered the video and medical evidence, in conjunction with witness testimony and applicable NYPD procedure, this tribunal finds that Respondent used a prohibited chokehold as defined by the Patrol Guide during this physical encounter.[10]

***b. Respondent's Conduct was Reckless***

The preponderance of the credible evidence established that Respondent's use of a prohibited chokehold was reckless and constituted a gross deviation from the standard of conduct established for a New York City police officer.

Under Penal Law §15.05(3), a person acts recklessly:

> with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

A determination of recklessness rests on a consideration of the totality of circumstances in each case. Whether the conduct "involved a substantial and unjustifiable risk . . . [is a]

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This tribunal notes that in a 2016 disciplinary case the Police Commissioner found that the use of a chokehold did not constitute actionable misconduct. The facts of the instant case, however, do not fall within the narrow and limited circumstances presented therein. Specifically, in *Disciplinary Case No. 2014-11368* (July 25, 2016), the Police Commissioner found an officer who used a chokehold not guilty of misconduct because he faced "extreme danger" during a lengthy physical altercation with an armed suspect who was "violently resisting arrest." Unlike here, the suspect exerted "extreme resistance to avoid arrest…not only…fight[ing] the officers [but also] reaching for the area where his loaded firearm was secreted and threaten[ing] the health and safety of officers by biting." Security concerns were compounded by a loud and hostile crowd that attempted to prevent the arrest by throwing garbage cans at the officers and a civilian who physically intervened by grabbing and attempting to pull the respondent away from the armed suspect.

question that generally must be left directly to the [fact finder]." *Police Dep't v. Baksh*, OATH Index No. 1471/97 (Oct. 2, 1997), citing *People v. Haney*, 30 N.Y.2d 328 (1972). "In determining a defendant's subjective perception or non-perception of the risk of harm, the trier of fact must examine the objective evidence of the surrounding circumstances. To constitute recklessness, these circumstances must show that 'the defendant engaged in some blameworthy conduct contributing to that risk. . . .'" *People v. Crosby*, 151 A.D.3d 1184 (3d Dep't 2017), *citing People v. Asaro*, 21 N.Y.3d 677 (2013); *People v. Licitra*, 47 N.Y.2d 554 (1979)

***i. Respondent was aware of the risks of a chokehold and the expected standard of conduct prohibiting its use***

At his IAB interview, Respondent unequivocally admitted that he was aware that chokeholds are prohibited by the Department. (Res. Ex. G at 43) Respondent's admission is not surprising. Chokeholds are somewhat unique in that they were one of only a few tactics explicitly prohibited, without exception, by the Department at the time of the incident. (Tr. 195, 247-48) Respondent's acknowledgement is also consistent with the indisputable evidence that his training included instruction on this specific Patrol Guide prohibition and its inherent risks.[11] (Tr. 196-210)

Inspector Dee, a Commanding Officer at the Police Academy, explained that Respondent received instruction on the chokehold prohibition during both classroom lessons and tactical training in the gym. Specifically, the prohibition was incorporated into multiple modules including those on arrests, the use of force and takedown techniques. Respondent also received a Student Guide that "supplement[ed] and further explain[ed] the [relevant] guidelines and the

[11] *See People v. Speringo*, 258 A.D.2d 379 (1st Dep't 1999) (Patrol Guide was relevant to defendant police officer's awareness of risk attendant with his acts.)

Patrol Guide." (Tr. 195-201, 226-27) Inspector Dee emphasized the following Student Guide section which explained the chokehold prohibition and alerted recruits to its lethal risks:

> Chokeholds include, but are not limited to, bar arm holds and carotid holds, and any pressure to the throat or windpipe that may prevent or hinder breathing, circulation or reduce intake of air. Around the country, in places that permit them, the police officers who have used them have not done so intending to kill or to cause serious injury--but they are deadly. The Department's policy on them is clear: chokeholds may not be used by members of the . . . Department against other persons. [emphasis added]
> (CCRB Ex. 15 at p.31; Tr. 204-05)

Likewise, the 2006 Recruit Manual for Department Physical Training and Tactics specifically cautioned recruits that:

> The N.Y.C.P.D. reserves the right to prohibit the officer from using specific unarmed physical force tactics. Chokeholds, for example, will not be used by members...against other persons. Tactics which limit a person's ability to breathe should be avoided...This directive is intended to reduce the possibility of in-custody deaths by limiting the tactics that hinder breathing or reduce air intake. [emphasis added]
> (CCRB Ex. 6 at 29)

A subsequent section outlining tactics specifically aimed at persons resisting arrest emphasized that officers were to "make every effort to avoid...sitting or standing on a subject's chest or back," and reiterated that chokeholds were "**PROHIBITED.**" *Id.* at 157. In addition, Inspector Dee explained that in 2006 recruits were given copies of the Patrol Guide and advised that violations could result in disciplinary action. (Tr. 196-97)

With strongly-worded and repeated warnings about the potentially lethal effects of chokeholds found throughout multiple sections of the training materials, it is evident that the Department made its 2006 recruits keenly aware of the inherent dangers associated with the application of pressure to the neck. Given this training, a New York City police officer could reasonably be expected to be aware of the potentially lethal effects connected with the use of a prohibited chokehold, and be vigilant in eschewing its use.

In short, the Police Academy training and the Patrol Guide prohibition each communicated to Respondent the Department's prevailing assessment that the risks associated with chokeholds were both substantial and unjustifiable. Accordingly, this tribunal finds that Respondent knew of the grave risks associated with prohibited chokeholds, and that by using one under these circumstances, he engaged in a gross deviation from the standard of conduct established for a New York City police officer.

***ii. Respondent consciously disregarded those risks***

CCRB must also prove that Respondent "consciously" disregarded the substantial and unjustifiable risks of a maneuver explicitly prohibited by the Department. I find that it did.

Respondent's counsel argued that that Mr. Garner's neck injuries occurred when Respondent sought to protect them from going through the glass storefront by pulling Mr. Garner "to the ground with his left arm touching the neck area." Counsel claims that this "incidental" contact with the neck lasted "a second or two" and was justified because the danger of going through a window was an exigent circumstance. (Tr. 897-98, 902, 906)

Although this tribunal does not agree with the characterization that the pressure exerted on the neck was "incidental," or that it constituted "mere touching," I concur, in part, with the assessment that hitting a glass storefront posed a risk of injury in this case. At trial, Damico expressed concern about the glass storefront, and indeed, he can be seen on the video pulling Mr. Garner away from it. (Tr. 623, 652-53) Mr. Orta repeated the same concerns when he testified that he saw the glass window buckle and thought they might crash through. (Tr. 74-75) After reviewing the video, Inspector Dee also acknowledged the difficulty Respondent faced at this point and stated that pulling Mr. Garner to the ground was "probably… the best option." (Tr.

238-39) The tribunal notes its own observation that the video captured the window warping as Respondent hit it and pulled away.

It is well established law that courts have been reluctant to closely second guess the "split second decisions" of officers in difficult circumstances. Instead, the courts analyze whether an officer's conduct was objectively reasonable. *See Koeiman v. City of N.Y.*, 36 A.D.3d 451 (1st Dep't 2007), citing *Graham v. Connor*, 490 U.S. 386, 396 (1989) (A reasonableness inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight...The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . .")

Based on this standard, and on this record, the tribunal is unpersuaded that the Patrol Guide chokehold captured on CCRB Ex. 1, File 2 from 2:25-2:26 constituted criminally reckless conduct. Respondent had set up for a rear takedown by wrapping his right arm under Mr. Garner's right armpit and around his right shoulder, placing his left arm over Mr. Garner's left shoulder and pressing his left hand against his upper chest. (CCRB Ex. 1, File 2 at 2:22) As captured on the video, the situation evolved rapidly and they stumbled toward the storefront. Although Respondent's left forearm moves up to the neck area as Respondent pulls Mr. Garner back, the evidence is insufficient to prove that, at that specific moment, Respondent acted in conscious disregard of his training. It is more likely that Respondent reacted to hitting the glass by steering a larger individual away from the window.[12]

[12] In making this finding, it is important to underscore that the nearness of glass, and even making contact with it, may not be a mitigating factor in all cases where an officer is charged with improper use of force. There are inherent environmental dangers on city streets during many confrontations— glass, concrete, moving traffic, elevated positions, to name a few. Whether any of these factors constitutes a mitigating factor requires a case-by-case determination by the trier of fact.

This defense, however, does not justify the entirety of Respondent's conduct. First, the argument that hitting the storefront created an exigent circumstance does not apply to the prohibited chokehold captured on CCRB Ex. 1, File 2 from 2:27-2:36 (CCRB Ex. 13O-13U), once Respondent was no longer against the glass. Second, the purportedly "incidental" pressure resulting from Respondent's "left arm touching the neck area" does not fully explain the bilateral hemorrhaging in multiple layers of Mr. Garner's strap muscles.

As this low-level arrest evolved, the totality of circumstances significantly changed. By 2:27, Respondent had come off the window. Mr. Garner was off his feet, facing toward the ground, with Respondent on his back. Officers Ramos and Furlani were on the scene and four officers were now available to secure the subject. Even accepting the testimony of multiple officers that Mr. Garner was tensing his arms, he was no longer yelling, he was off balance and the officers had other options available to gain compliance. (Tr. 486, 500, 523-24, 533, 627)

Most importantly, Respondent had the opportunity to readjust his grip from a prohibited chokehold to a less lethal alternative; he did not. It is at this point that the video shows that Respondent's right arm is no longer in its initial position underneath Mr. Garner's armpit. Instead, Respondent's right hand clasps his left hand while his left forearm is still wrapped around Mr. Garner's throat in a chokehold. (CCRB Ex. 1, File 2 at 2:27-2:29) Mr. Garner's right hand opens, palm up, in what appears to be an initial sign of distress, and he makes a guttural sound. (*Id.* at 2:31) As Mr. Garner now lies on his side, with his left arm behind his back and his right hand still open and extended, Respondent keeps his hands clasped and maintains the chokehold. (*Id.* at 2:32-2:35; CCRB Exs. 13R, 13S, 13T) Mr. Garner's obvious distress is confirmed at 2:34-2:35, when he coughs and grimaces. (Tr. 218-21; CCRB Ex. 13T)

It was here that Respondent's conduct escalated from a Patrol Guide violation to criminal recklessness. Respondent was not without other options at this point; nonetheless, his right hand grasped his left, reinforcing a prohibited maneuver, even though Mr. Garner had already fallen and the window was no longer an exigency. The only reasonable inference that can be drawn from his actions is that Respondent, aware that his forearm was exerting pressure on Mr. Garner's throat, disregarded the risks associated with this banned maneuver.

In sum, the preponderance of the credible evidence established that Respondent consciously disregarded the well-delineated risks of a strictly prohibited chokehold that he was trained never to employ. As such, I find that Respondent's conduct was reckless.

*c. **Respondent's Recklessness Caused Physical Injury***

*i. **The Victim's Physical Injury Meets the Penal Law Threshold***

The record amply supports a finding that Respondent's reckless conduct caused physical injury in this case. Section 10.00(9) of the Penal Law defines "physical injury" as "impairment of physical condition or substantial pain." Mr. Garner experienced both.

Legal precedent does not set precise definitions for these terms. New York courts, however, have provided guidance by finding that "impairment of physical condition" does not require a victim's "incapacitation" so long as the injury rises above "petty slaps, shoves, [and] kicks." *People v. Tejeda*, 165 A.D.2d 683 (1st Dep't 1990), aff'd 78 N.Y.2d 936 (1991); *see People v Livoti*, 177 Misc. 2d 951 (App. Term 1st Dep't 1998) (small areas of redness "on both sides of the windpipe area" of the complainant's neck and soft tissue injury consistent with the infliction of pressure to the neck supported the trial court's finding that the complainant suffered physical injury); *People v Estavez*, 47 Misc. 3d 497 (Sup. Ct., N.Y. County 2015) ("the literal

definition of the word 'impairment. . .' would not seem to require any minimum time duration nor that an impairment be substantial").

Moreover, the courts have described "substantial pain" as "more than slight or trivial pain" and have explained that it need not be "severe or intense" to meet the threshold. *People v Chiddick*, 8 N.Y.3d 445 (2007) (physical injury and substantial pain demonstrated where bite caused fingernail to crack and bleed and the victim suffered moderate pain.); *see also People v. Carte*, 113 A.D.3d 191 (3d Dep't 2013) (threshold for substantial pain met where victim had abrasions on face and neck and experienced painful breathing, nausea and shortness of breath after strangulation.)

The weight of the evidence established that Respondent's application of pressure to Mr. Garner's anterior neck, after they were no longer against the glass storefront, caused physical injuries which meet the statutory definition. As noted above, the pressure exerted at or about 2:25-2:26 on the video was likely limited to the left side of the neck. The record proved, however, that there was bilateral hemorrhaging in the neck area. This makes it more likely than not that additional injuries were inflicted after 2:27 on the video: the point when Respondent recklessly clasped his hands and pressed his left forearm against Mr. Garner's throat. A summary of the evidence supporting this finding is set forth below.

Dr. Persechino testified that during the autopsy dissection, she observed "hemorrhages in muscles of the anterior neck...a patterned area [or "transverse band"] of hemorrhage that stretched across the anterior surface of the neck, and involved different muscle groups" which spanned four different layers of muscles in the neck. Three levels of muscle groups - the sternocleidomastoid, the omohyoid and the sternohyoid - showed hemorrhaging on both sides of the neck, not just the left side. There was also hemorrhaging in the right thyrohyoid muscle. She

explained that a hemorrhage is the "seepage of blood from a ruptured blood vessel into surrounding tissue" that is "most often" caused by trauma. In this case, a microscopic review indicated that the hemorrhaging was "fresh," meaning that it occurred around the time of death. (Tr. 290-99) Dr. Persechino opined that Respondent's compression of Mr. Garner's neck, which was partially captured on CCRB Ex. 1, File 2 at 2:30 and 2:32, would have been the cause of these hemorrhages. (Tr. 301, 306, 310-311, 314-16; CCRB Exs. 13O, 13R)

These particular findings were not contested by Respondent's medical expert. When presented with the autopsy images, Dr. Michael Graham agreed that there was fresh hemorrhaging in multiple neck muscles. While he did not believe this necessarily restricted breathing, he did concur that pressure to the anterior neck caused the kind of bruising observed in the autopsy. (Tr. 798-804, 807-09)

This tribunal credited Dr. Persechino's expert testimony that the application of pressure to the anterior neck in the area of the larynx was a "painful phenomenon." (Tr. 306-07) Mr. Garner also exhibited obvious signs of physical distress. For example, on CCRB Ex. 1, File 2 at: 2:29 he grimaced; at 2:31 he made a guttural sound; and at 2:33-34 he coughed and grimaced again.

The only reasonable conclusion that can be drawn from the preponderance of the credible evidence is that Respondent's recklessness caused multi-layered internal bruising and hemorrhaging that impaired Mr. Garner's physical condition and caused substantial pain as defined by Penal Law §10.00(9) and in violation of Penal Law §120.00(2).

***ii. Respondent's recklessness was a significant factor in triggering an asthma attack***

Although this issue need not be reached to establish physical injury pursuant to Penal Law §120.00(2), this tribunal further finds that Respondent's recklessness was a significant factor in triggering the asthma attack which contributed to Mr. Garner's death.

Whether Mr. Garner suffered an acute asthma attack just prior to his death was pointedly contested at trial. What follows is a summary of the most salient and relevant conclusions presented by each of the medical experts on this point.

Dr. Persechino is the Senior New York City Medical Examiner who conducted the autopsy in this case. Although called by CCRB as an expert witness, she testified that the role of a medical examiner is to represent the interests of the decedent. At trial, Dr. Persechino explained that autopsies are generally performed to determine the "cause of death." That phrase is a term of art defined by Dr. Persechino as "the injury, the disease, or combination of the two that brought about the lethal cascade of events or physiological disturbances that ultimately led to the death . . . ." As recorded in the Report of Autopsy, Dr. Persechino certified that the cause of Mr. Garner's death was "compression of neck, chokehold, chest compression, prone positioning during physical restraint by police," and listed "acute and chronic bronchial asthma, obesity and hypertensive cardiovascular disease" as contributory causes. (Tr. 274, 319-20; CCRB Exs. 9, 16 at p.2)

Dr. Persechino described the "lethal cascade" that precipitated Mr. Garner's death as follows: "It is my opinion that...the chokehold, the chest compression, the prone position, set into motion a lethal sequence [or cascade] of events, where [underlying] natural diseases now are contributing to ... the death ... but they are being triggered by what is happening, the injuries and the physical restraint . . . at that point in time." Dr. Persechino concluded that the chokehold

was "a significant initial factor in the cascade." She noted that it "compressed . . . his airway making it difficult for him to breathe," thereby "participat[ing] in triggering the asthma attack" that ultimately contributed to Mr. Garner's death. (Tr. 311-13, 374)

The Senior Medical Examiner explained that a microscopic examination of tissue was conducted as part of the autopsy and disclosed that eosinophils had infiltrated the bronchial walls. Eosinophils are cells that penetrate the airways and "release mediators of inflammation" that cause swelling in the bronchial walls and impair the ability to breathe during an asthma attack. Dr. Persechino acknowledged that Mr. Garner was "not a healthy individual" and that he suffered from chronic asthma and a hypersensitive airway. Nonetheless, her autopsy revealed not just evidence of chronic asthma, but also convincing evidence that when he died, Mr. Garner was in the midst of an acute asthma attack. (Tr. 313, 353-57, 367; CCRB Ex. 9)

Respondent's medical expert was Dr. Michael Graham, the Chief Medical Examiner for the City of St. Louis and a professor of pathology at St. Louis University. He contested the New York City Medical Examiner's finding that Mr. Garner was suffering from an acute asthma attack at the time of his death. Dr. M. Graham testified that according to the Report of Autopsy, Mr. Garner's lungs had undergone physiological changes that were consistent with chronic asthma. When asked on cross-examination about the autopsy's Histopathology Report outlining the microscopic finding of eosinophils in the bronchial walls, he testified that those findings were "evidence of the asthma, but not necessarily an acute attack." Dr. M. Graham opined that pressure on the trachea or airways could not directly trigger an asthma attack. He did agree, however, that an "emotional reaction" to a neck compression could be a stimulus for an acute asthma attack. Specifically, he stated that, "The person could react negatively to getting their neck … squeezed and then precipitate an asthma attack, sure." (Tr. 765-766, 789, 796, 812-13)

Dr. M. Graham testified that nothing he observed on CCRB Ex. 1, File 2, from 1:00-2:18, prior to the physical encounter, indicated that Mr. Garner was suffering from an acute asthmatic attack. He pointed out that in the video Mr. Garner can be seen "talking rapidly. It doesn't look like he is short of breath at all. He doesn't stop talking or moving around because he can't breathe...as far as a serious asthmatic attack, he is not bending over struggling to get breath in or out. He just looks agitated." Turning to the 2:30-2:45 segment, Dr. Graham explained that Mr. Garner:

> ...probably felt he couldn't breathe, but the fact of the matter is he could breathe. Breathing is just moving air in and out. He is talking, he can move air. But with a lot of conditions, you may get the sensation that you feel like you can't breathe. People come into the hospital with heart failure, one of the major complaints is shortness of breath. People with asthma; can't breathe. Just because he is complaining of shortness of breath doesn't mean that's because of everything happening with the neck. It could be a lot of things.
> (Tr. 782-86)

Dr. M. Graham further concluded that the cause of Mr. Garner's death was heart disease exacerbated by his interaction with law enforcement. He opined that the heart failure began approximately at the time that Mr. Garner began to complain about shortness of breath. He noted that he could not pinpoint a specific trigger for the cardiovascular malfunction, offering that "there are a lot of factors involved...it's that whole milieu of the emotional and physical exertion on top of a susceptible heart." (Tr. 789-91)

CCRB's rebuttal witness, Dr. Jason Graham, is the First Deputy Chief Medical Examiner for the City of New York. He disagreed with Dr. Michael Graham's conclusion that the Histopathology Report did not contain evidence of an acute asthma attack. He concurred with Dr. Persechino's conclusion that compression of the neck and prone positioning "set in motion a lethal chain of events" and that Mr. Garner "was in the midst of an acute exacerbation of his

chronic bronchial asthma at the time of this death." Dr. J. Graham pointed to the following microscopic tissue analysis, contained in the Report of Autopsy, to support his medical opinion:

- "Acute eosinophilic infiltrate:" Dr. J. Graham explained, "Eosinophils are inflammatory reactive blood cells that make their way to the walls of airways and release chemicals that create a cascade effect in asthmatic [individuals.]" In Mr. Garner's case, there was an actively occurring infiltration of those cells that "produced the effects of an [acute asthma attack]."

- "Lumen with degranulation of the eosinophils:" Eosinophils were found not only in the bronchial wall, but also within its tubular structure and in the decedent's mucus. He testified. "The degranulation of those inflammatory cells is something seen under the microscope and that occurs in the acute phase of an asthma attack."

- "Intra bronchial mucus:" The tissue section of Mr. Garner's lungs showed an overproduction of mucus that "found its way into . . . the middle portion of the tubes of the airways." This also occurs during an active asthma attack.

(Tr. 854, 861-66, 883; CCRB Ex. 9 at p.10)

Dr. J. Graham further disagreed with Dr. M. Graham's assessment that Mr. Garner was able to move air at all points depicted on the video. He noted that there was a "brief period" after the chokehold was applied where Mr. Garner stopped speaking, then grunted, then made a garbled attempt to speak before stating, "I can't breathe" multiple times. He affirmed that this brief inability to vocalize likely occurred due to compression of the neck such that Mr. Garner was unable to maneuver the muscles of the voice box or move air. (Tr. 869-70)

Assessment of expert opinion evidence is "ordinarily within the province of the tribunal charged with deciding the facts...." *Disciplinary Case No. 7616/12* (March 28, 2017) *citing Comm'r of Welfare v. Simon*, 20 A.D.2d 865, 866 (1st Dep't 1964); *see* Prince, Richardson on Evidence § 7-305 (Lexis 2008). The expert's qualifications are one factor to be considered. *Felt v. Olson*, 74 A.D.2d 722 (4th Dep't 1980), *aff'd*, 51 N.Y.2d 977 (1980). "The weight to be given to [expert] testimony is a question of fact for the trial court. Such testimony may be rejected by

the trial court if it is improbable, in conflict with other evidence or otherwise legally unsound." *Desnoes v. State of N.Y.*, 100 A.D.2d 712, 713 (2d Dep't 1984).

Upon careful examination of the medical testimony and exhibits, this tribunal found Dr. Persechino and Dr. J. Graham to be exceptionally qualified and unbiased witnesses who were well-versed in their areas of medical expertise. As such, they presented this tribunal with a cohesive, fact-based and reasoned summary of medical findings that support a conclusion that the chokehold used on Mr. Garner was a significant factor in triggering the acute asthma attack which contributed to his tragic death. Their medical conclusions were also consistent with this tribunal's review of the video. Mr. Garner, despite being agitated and in poor health, did not appear in any apparent physical distress until Respondent put his forearm around his neck. (Tr. 307-10; CCRB Ex. 2)

Although Dr. M. Graham also presented as a knowledgeable medical professional, in comparison, his testimony fell short on the issue of the asthma attack and the impact of the chokehold. This tribunal found his testimony on critical points to be conclusory, dismissive and without sufficient substantiation. For example, his statement that eosinophils in the bronchial walls were "evidence of the asthma, but not necessarily an acute attack" was somewhat equivocal, as well as unsupported by data or scientific references.

Likewise, Dr. M. Graham's observations, upon review of the video, that it "just doesn't look like [an asthma attack] to me." was vague and provided little guidance on the critical medical issues in dispute. He also failed to convince this tribunal that the chokehold itself did not have a deleterious effect because Mr. Garner spoke after the chokehold was released. It should be emphasized that although Dr. M. Graham made the unsupported statement that compression of the neck alone could not trigger an asthma attack, he did concede that an asthma

attack could be stimulated by an individual becoming "emotionally upset...or...straining" while his neck was compressed. (Tr. 796)

Accordingly, I find that Dr. Persechino and Dr. J. Graham presented convincing evidence that when he died, Mr. Garner was in the midst of an acute asthma attack. As the medical examiner who actually performed the autopsy explained, a microscopic tissue examination revealed that eosinophils infiltrated the bronchial walls causing the inflammation present in an acute asthma attack. I also find that the weight of the evidence supports a finding that the chokehold was a significant factor in triggering the asthma attack that contributed to Mr. Garner's death.

***d. Justification Defense***

Respondent maintains that the force used in this case was justified pursuant to Penal Law §35.30. The justification defense established in that section provides that:

> A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force....

CCRB contends that Respondent is barred from raising a Penal Law defense in an administrative disciplinary hearing. This tribunal has considered and rejected CCRB's arguments on this point. Here, Respondent may interpose a §35.30 defense because the Charges and Specifications were not served in a timely manner and the tribunal is compelled to consider the elements of a Penal Law crime. To that end, CCRB's argument that this tribunal is "required

to follow" *Bott v. Board of Ed.*, 41 N.Y. 265, 268 (1977), a case where the crimes exception to the statute of limitations was not a factor, is patently incorrect.[13]

Turning to the substance of the defense, force is justified under §35.30 "to the extent that an officer reasonably believes such [force] is necessary to effectuate the arrest." Resistance to arrest raises the threshold level of reasonable force which may be used in response. *Police Dep't v. Rotundi, et al.*, OATH Index Nos. 919/97, 921/97 and 922/97 (Sept. 4, 1998), Comm'r Dec. (Oct. 30, 1998). While the reasonableness inquiry is rooted in the officer's individual belief, it is not a wholly subjective standard. The courts uniformly apply a standard that contains an objective component: the conduct of "a reasonable person" under similar circumstances. *People v. Goetz*, 68 N.Y.2d 96 (1986).

Respondent's counsel argued that the force used by Respondent was "justified under the totality of the circumstances," and specifically emphasized factors such as "Eric Garner's size, his obesity, his obvious strength coupled with resisting arrest and unwillingness to be cuffed." He also cited to the exigency created by the glass storefront. (Tr. 895-98)

As discussed in more detail above, this tribunal agrees that the chokehold Respondent used when Mr. Garner was standing, and when Respondent hit the glass storefront, was not criminally reckless. (CCRB Ex. 1 File 2 at 2:25-2:26) After coming off the glass, however, the preponderance of the evidence established, not only that Respondent's actions were reckless, but also that they were not legally justified. There was no basis for an NYPD officer to "reasonably believe" that maintaining a prohibited chokehold was "necessary to effect the arrest." Mr.

[13] CCRB overstates the holding of this case. *Bott* involved a schoolteacher brought up on disciplinary charges for allegedly using corporal punishment against students and who raised a defense pursuant to Penal Law § 35.10(1). In its decision, the Court of Appeals did not state that Penal Law defenses can never be raised in any civil disciplinary proceeding. Rather, the Court rejected that teacher's argument that charges in his case should have been dismissed for lack of proof that they constituted a crime given the language of Section 35.10. The Court correctly noted that the justification defense did not speak to the standard to which teachers could be held in a noncriminal context and that burdens of proof were different in criminal and administrative settings.

Garner was already off his feet, several officers were assisting and the exigency of the window was no longer immediate. Nevertheless, Respondent kept his forearm across Mr. Garner's neck and clasped his hands. Under these circumstances, it was inherently unreasonable for a trained NYPD officer to believe that maintaining a prohibited chokehold, which should not have been used in the first place, was "necessary" to arrest this civilian.

The tribunal appreciates the difficult circumstances of street encounters and it acknowledges that this situation evolved rapidly. Nonetheless, Respondent's continued grasp on Mr. Garner's throat, a maneuver Respondent was trained to never employ, was not objectively reasonable by any measure. Therefore, CCRB satisfied its evidentiary burden and proved that the justification defense fails on the merits.

***e. Finding***

For the reasons set forth above, this tribunal finds that CCRB has established all elements of Assault in the Third Degree, as set forth in §120.00(2) of the Penal Law, by a preponderance of the credible evidence. Accordingly, Respondent is found Guilty of the misconduct alleged in Specification 1.

## 4. Strangulation in the First Degree

Specification 2 alleges that Respondent "intentionally restricted Eric Garner's breathing by applying pressure to his throat and/or neck without police necessity, causing serious physical injury." The language of this specification mirrors that of §121.13 of the Penal Law:

> A person is guilty of strangulation in the first degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article and thereby causes serious physical injury to such other person.

To prove the elements of this crime, it must first be established that there was criminal obstruction of breathing as defined by Penal Law §121.11. A person is guilty of "criminal

obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she: (a) applies pressure on the throat or neck of such person; or (b) blocks the nose or mouth of such person." Here, the record does not support such a finding.

***a. The Record Failed to Establish that Respondent Acted with the Required Intent***

As set forth in N.Y. Penal Law §15.05(1), "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." Intent does not require a finding of advance planning; it can be formed "and need only exist at the very moment a person engages in prohibited conduct or acts to cause [a] prohibited result, and not at any earlier time." *See People v. Brown*, 21 N.Y.3d 739, 744 (2013); *People v. Muhammad*, 17 N.Y.3d 532 (2011), citing CJI2d [NY] -- *Culpable Mental States- Intent*. Direct or tangible evidence of an individual's mindset is rarely available; therefore, intent must often be inferred from the conduct and the surrounding circumstances. *See People v. Rodriguez*, 17 N.Y.3d 486, 489 (2011); *People v. Carte, supra* at 195; *People v. Coluccio*, 170 A.D.2d 523 (2d Dep't 1991). Having scrutinized the video and considered the record in its entirety, the tribunal is not satisfied that CCRB met its evidentiary burden with respect to this element of §121.13.

CCRB asserts that intent can be "readily inferred" and "observed" on the video as Respondent "reaches with his right hand and clasps his left hand, then pulls [his] arm backward, tightening the pressure on Mr. Garner's neck" for an "extended period after the arrival of back-up officers." CCRB further contends that it was on the ground that Respondent formed an "intent to strangle Eric Garner, he knew what he was doing" when he "intentionally applied

additional pressure...because he was angry that [Mr. Garner] was still moving and [wanted] to make him stop . . . ." (CCRB Post-Trial Brief at pp. 32-33; Tr. 966, 971-74)

Conversely, Respondent's counsel argues that Respondent did not intend to harm Mr. Garner or obstruct his breathing, but was simply attempting to "do his job" and effectuate the lawful arrest of a larger, noncompliant individual by bringing him to the ground. According to counsel, Respondent's use of an authorized takedown maneuver is indicia that his intent was to handcuff Mr. Garner, and that any contact with his neck was "incidental." Finally, counsel read into the record Respondent's own statement to IAB investigators. When asked, "What was your intent in this maneuver, what were you trying to achieve?" Respondent answered, "Just try[ing] to bring him down to the ground." (Tr. 891, 911-12, 915-18; Resp. Ex. G at p. 40)

Here, the totality of circumstances favors a finding that, even though Respondent recklessly used a prohibited chokehold, the evidence was insufficient to prove that he did it with the intent of obstructing Mr. Garner's breathing. First, Respondent did not target Mr. Garner for this enforcement action. He was ordered to Tompkinsville Park by a supervisor who wanted a condition investigated and addressed. Second, Respondent relied on his partner's observation of an unlawful sale of cigarettes, not his own, and was therefore taking lawful police action when he moved in to effectuate this arrest. Third, for over five minutes, the officers followed tactical guidelines by remaining calm as they attempted to convince Mr. Garner to cooperate. Even after Mr. Garner raised his voice, gestured broadly and refused to comply with their orders, Damico and Respondent maintained their composure and they continued efforts to deescalate the situation.

More importantly, when Respondent moved in to handcuff Mr. Garner, he first grabbed his wrist and elbow in what looked like an attempted arm bar hold. Only after Mr. Garner pulled

away did Respondent attempt a rear takedown by putting his right arm under Mr. Garner's right armpit, his left arm over Mr. Garner's left shoulder with his left hand against his upper chest. It is important to underscore that, initially, Respondent did not seek to gain compliance of the subject by setting up for, or using, a prohibited chokehold. Instead, he originally attempted to handcuff a larger individual who was resisting arrest by executing two maneuvers sanctioned by the Department.[14]

Undoubtedly, Respondent's forearm moved up to the anterior neck and remained there in a prohibited chokehold as they fell and hit the ground. As noted above, it was especially troubling to this tribunal that after coming off the window, Respondent recklessly clasped his hands as his forearm pressed against Mr. Garner's neck. Within the context of the entire encounter, however, the tribunal is not persuaded that Respondent's intent, even when his hands were clasped, was to impede Mr. Garner's breathing.

CCRB provided case law in support of the proposition that intent to impede breathing can be readily inferred from a defendant's act of putting pressure on a victim's neck. Those cases, however, present markedly different factual scenarios. For example, three cases involve physical altercations during domestic incidents. In general, the inferences that can be drawn when a police officer makes contact with a subject's neck during a lawful arrest are far less clear cut than those that can be drawn when a subject grasps the throat of a partner or family member during a domestic fight. *See People v. Robinson*, 158 A.D.3d 1263 (4th Dep't 2018) (father's intent to impede adult son's normal breathing during a physical altercation "could be inferred from the evidence that he applied pressure to the victim's neck"); *People v. Peterson*, 113 A.D.3d

[14] Inspector Dee reviewed the video at trial and testified that it "appeared" that Respondent was attempting a "seatbelt" takedown. He detailed that this "variation of a rear takedown" was not part of the Department's training curriculum when Respondent was a recruit in 2006 or when he received plainclothes training in 2008. The seatbelt maneuver, however, was incorporated into the training curriculum in 2011 -- three years prior to this incident. I have considered and rejected CCRB's argument that it was inappropriate for Respondent to use a takedown maneuver that was authorized at the time solely because he had not received formal training in its use. (Tr. 213-17, 234-36, 246-47)

1151 (3d Dep't 2014) (after a "violent and unauthorized" entry into a former partner's residence, defendant's intent to interfere with the victim's breathing was "inferred from his conduct in grasping the victim's neck and thereafter maintaining his grip around her throat as he pushed the victim [back] into the apartment"); *People v. Carte*, *supra* at 192-95 (domestic incident where court found defendant's intent to interfere with the victim's breathing could be readily inferred from his choking her while covering her nose and mouth with pizza and/or his hand).[15] In short, the surrounding circumstances in each of these cases are very different from the case at hand and are therefore inapplicable.

The record failed to establish that Respondent acted with intent to impede Mr. Garner's breathing as required by Penal Law §121.13. Having made this finding, the tribunal need not address the remaining elements of the charge. Accordingly, Respondent is found Not Guilty of Specification 2.

## 5. Penalty

In order to determine an appropriate penalty, Respondent's service record was examined. *See Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 20, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department's prohibition against the use of chokeholds is unequivocal and absolute. Respondent's training explained why: chokeholds are "deadly." Moreover, Respondent's written training materials expressly cautioned that the prohibition was in place "to reduce the possibility of in-custody deaths" because chokeholds are potentially lethal even when a police officer "[is]

[15] The facts of a fourth case cited by CCRB are in no way comparable to the instant matter. *Matter of Jesse Z.*, 116 A.D.3d 1105 (3d Dep't 2014) involved a juvenile delinquency proceeding where a student impeded a classmate's breathing after luring the victim to a secluded stairwell and pressing his arm around her neck.

not...intending to kill or to cause serious injury." For these reasons, chokeholds were and remain one of only a few force tactics expressly prohibited by the Department.

It is important to underscore that the Department's chokehold ban exists, not only to protect members of the public, but also to put police officers on notice that disregarding the prohibition can have deadly consequences. As noted by this tribunal in a prior chokehold case, though it was "clear . . . that the respondent did not intend to murder or seriously injure [a civilian]...he was on notice that neck-holds ... of suspects can kill them. When he wrapped his arm around [the] neck, he...assumed that risk and a person died." *See Disciplinary Case No. 69744/95* (Feb. 21, 1997) at p. 111.

Here, Respondent's use of a chokehold fell so far short of objective reasonableness that this tribunal found it to be reckless -- a gross deviation from the standard of conduct established for a New York City police officer. Moreover, Respondent's glaring dereliction of responsibility precipitated a tragic outcome. The credible medical evidence and expert testimony demonstrated that Respondent's recklessness caused internal hemorrhaging in Mr. Garner's neck and was a significant factor in triggering the acute asthma attack which contributed to his death.

In sum, Respondent's egregious misconduct led to the deadly consequences his training anticipated and which the prohibition was designed to prevent. As noted in *Disciplinary Case No. 7616/12* (March 28, 2017), the tribunal cannot "overlook" the fatal consequences of an officer's reckless disregard of Department procedure.

This tribunal acknowledges that this case is singular in its facts; therefore, analogous precedent is scarce. However, *Disciplinary Case No. 69744/95, supra,* addressed a strikingly similar set of circumstances and medical issues. In that case, a veteran police officer was dismissed from the Department after applying a "forbidden chokehold" to a disorderly conduct

arrestee, who subsequently died "from neck and chest compression with chronic asthma as a contributing factor." There, the Trial Commissioner noted that "[a]lthough it was never proved that the chokehold was the sole cause of death, the neck compression began the downward spiral that ended with [the individual's] death" and termination was warranted. I have come to the same conclusion on the instant facts.

Accordingly, this tribunal finds that there is only one appropriate penalty for the grave misconduct that yielded an equally grave result – Respondent can no longer remain a New York City police officer.

In making this penalty recommendation this tribunal recognizes that from the outset Mr. Garner was non-compliant and argumentative, and further notes that the Patrol Guide allows officers to use "reasonable force" when necessary to take an uncooperative individual into custody. What the Patrol Guide did not allow, however, even when this individual was resisting arrest, was the use of a prohibited chokehold.

Having considered relevant precedent, in conjunction with the arguments, caselaw, and evidence presented at trial, it is recommended that Respondent be DISMISSED from the New York City Police Department.

**APPROVED**

AUG 19 2019

JAMES P. O'NEILL
POLICE COMMISSIONER

Respectfully submitted,

Rosemarie Maldonado

Rosemarie Maldonado
Deputy Commissioner Trials

POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DANIEL PANTALEO
TAX REGISTRY NO. 942805
DISCIPLINARY CASE NO. 2018-19274

Respondent was appointed to the Department on July 20, 2006. On his last three annual performance evaluations, he received 4.0 overall ratings of "Highly Competent" for 2014, 2015 and 2016. He was awarded 13 medals for Excellent Police Duty and one medal for Meritorious Police Duty. [redacted].

Respondent previously forfeited two vacation days for frisking an individual without sufficient legal authority in 2012. In the same proceeding, he was found Not Guilty of an illegal stop.

On July 16, 2013, Respondent was placed on Level 1 Force Monitoring for having received three or more CCRB complaints in a one-year period. Monitoring remains ongoing. He has been on modified assignment since July 19, 2014 in connection with the instant matter.

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials